Nos. 98-791, 98-796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

J. DANIEL KIMEL, JR., *et al.*,

Petitioners,

-and-

UNITED STATES OF AMERICA,

Petitioner,

vs.

FLORIDA BOARD OF REGENTS, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UNIVERSITY OF MONTEVALLO

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress in the Fair Labor Standards Amendment of 1974 make its intent to abrogate the Eleventh Amendment immunity of the States "unmistakably clear" as required by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996)?

2. Did Congress enact the Fair Labor Standards Amendment of 1974 pursuant to the Fourteenth Amendment, which in light of *Seminole Tribe* can be the only source of authority for abrogation of the Eleventh Amendment?

3. Even if the abrogation questions (Questions 1 and 2) are answered in the affirmative, did the Fair Labor Standards Amendment of 1974 comply with the principle expressed in *City of Boerne v. Flores*, 521 U.S. 507 (1997) that the Legislative branch may not enact Fourteenth Amendment legislation exceeding the boundaries of equal protection jurisprudence as defined by the Judicial branch?

LIST OF PARTIES

The parties to this Alabama case consist of Associate Professors Roderick MacPherson and Marvin Narz and their employer the University of Montevallo, which is an entity of the State of Alabama. The University of Montevallo is not in a position to make any representation regarding the parties to the Florida cases with which this case was consolidated for oral argument (not for briefing) in the Court of Appeals. Following consolidation for oral argument in the Court of Appeals, the United States intervened pursuant to 28 U.S.C. § 2403(a).

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STATEMENT OF THE CASE

Professors MacPherson and Narz first sued the University under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*. (ADEA) in an earlier case which reached the Court of Appeals, *MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991), and was subsequently settled. They then filed this their second ADEA lawsuit in the United States District Court for the Northern District of Alabama alleging age discrimination and retaliation for their first ADEA lawsuit in not being promoted to full professor and in their evaluations, salaries, committee assignments, sabbaticals, benefits, and retirement incentives.

Following *Seminole Tribe*, the District Court on the University's motion dismissed the action, holding that "the ADEA was enacted pursuant to the Commerce Clause and not the Fourteenth Amendment." 938 F. Supp. 785, 789 (N.D. Ala. 1996), App. 61a, 63a.[1] The Court of Appeals for the Eleventh Circuit affirmed, 139 F.3d 1426 (11th Cir. 1998), App. 1a, based on: (a) one Judge concluding that the 1974 amendment failed to comply with the requirement of an "unmistakably clear" intent to abrogate;[2] and (b) another Judge concluding that in light of *City of Boerne*, the 1974 amendment exceeded the bounds of equal protection jurisprudence.[3]

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1. To avoid duplication, references are to the Appendix in the Florida petition.

2. 139 F.3d at 1428-1433, App. 2a-13a.

3. 139 F.3d at 1444-1448, App. 38a-48a.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONS ARE ASKING FOR EARLY REVISITS TO *SEMINOLE TRIBE* AND *BOERNE*

Within the immediately preceding Terms, the Court has extensively addressed the subjects of this case. The Eleventh Amendment was the subject of the Court's decisions in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and again in the next Term in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (referring to "the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction."). The necessity of the Legislative branch respecting the boundaries of equal protection jurisprudence as established by the Judicial branch was addressed in *City of Boerne v. Flores*, 521 U.S. 507 (1997). That constitutes substantial attention in the recent Terms to those subjects.

The petitions are thus asking the Court to revisit areas of the law which it has only recently addressed extensively. But such an early revisit would hardly be appropriate at this time, particularly since (contrary to the petitioners' implication otherwise) the Circuits have not yet considered in any depth the impact of *Boerne* on the extension of ADEA coverage.[4]

So also, the dimensions of those recent cases are still in the process of development. Their significance

4. This point is discussed in Section III-C, *infra*.

placed them in the limited space available in the 1996 and 1997 Supreme Court Reviews.[5] Their impact just on employment alone is continuing to be the subject of on-going legal commentaries.[6]

Implicitly recognizing they are asking the Court for an early return to those 1996 and 1997 decisions, the Florida petitioners characterize their arguments as addressing "follow on questions" with respect to *Seminole Tribe*.[7] But it is unrealistic to ask the Supreme Court to be the final arbiter of every issue and contention arising in the myriad applications of the Court's decisions, for that would perpetually mire the Court in returning to Terms past rather than resolving the new issues arriving daily in the current Term. Unless "follow on questions" are to become an annual event, the petition's invitation should be declined.

Moreover, it would be exceedingly myopic to view *Seminole Tribe* and *Boerne* as impacting only Federal legislation regulating State employment. The cases

5. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Supreme Court Review 1; Eisgruber and Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 Supreme Court Review 79.

6. E.g., Fitzpatrick, *The Effect of Seminole Tribe and the Eleventh Amendment in Employment Cases in Current Developments in Employment Law*, ALI-ABA 113 (1998); Note, *Section 5 and the Protection of Nonsuspect Classes After City of Boerne v. Flores*, 111 Harv. L. Rev. 1542 (1998).

7. Florida petition at 4-5. They disregard the *Boerne* question, even to the extent of omitting it from their questions presented.

thusfar are few, but analysis in the legal commentaries has already extended to bankruptcy law, environmental law, intellectual property law, and antitrust law.[8] It would thus be premature to revisit *Seminole Tribe* and *Boerne* for employment law alone before their impact on the law in general has developed in the courts below.

II.

THE ABROGATION QUESTIONS DO NOT WARRANT REVISITING AT THIS TIME

A. The Road Creating The Problems:

The abrogation questions arise from the following sequence of events:

1. The 1966 amendment to the Fair Labor Standards Act:

As enacted in 1938, the FLSA excluded the States from coverage. Then in 1966 Congress tried to extend coverage to certain State entities by amending the definition of "employer" in the FLSA to include those State entities.[9] But that was an ill-fated effort, as the Court held in *Employees of the Department of Public*

8. This list is taken from Westlaw data searches of articles with the names of the cases in the title, consisting of 45 for *Seminole Tribe* and 25 for *Boerne*.

9. The State entities to which FLSA coverage was expanded in 1966 were hospitals, nursing homes, mental health facilities, elementary and secondary schools, and institutions of higher education.

Health & Welfare v. Missouri, 411 U.S. 279 (1973) that amending the definition of "employer" to include State entities failed to abrogate Eleventh Amendment immunity.

2. Enactment of the ADEA in 1967:

Congress enacted the ADEA in 1967 with the States excluded. Like the FLSA, it was grounded in the Commerce Clause. From the start until today, one section of the ADEA has provided that it "shall be enforced in accordance with the powers, remedies, and procedures" provided by the FLSA, 29 U.S.C. § 626(b), and the immediately following section has provided that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter," 29 U.S.C. § 626(c).

3. The Fair Labor Standards Amendment of 1974:

Congress reacted to this Court's 1973 decision in the *Missouri* case by enacting the Fair Labor Standards Amendment of 1974.[10] The major purpose of the 1974 amendment was to cure the defect which resulted in the downfall of the 1966 amendment to the FLSA and to extend the coverage of the FLSA "to virtually all state and local government . . . employees." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 533 (1985).

10. P.L. 93-59, Fair Labor Standards Amendment of 1974, 1 U.S. Code Cong. and Adm. News 55 (93rd Cong., 2nd Sess. 1974).

In the process of expanding the FLSA to the States in 1974, Congress likewise expanded the ADEA to the States because doing so "is a logical extension of the committee's decision to extend FLSA coverage to Federal, State, and local government employees."[11] But it committed a series of errors which were to prove fatal when the Court restored the balance of power between the States and the National Government in the 1990's.

(a) *Continued reliance on the Commerce Clause*: Congress had only two years earlier relied on § 5 of the Fourteenth Amendment in extending the coverage of Title VII of the Civil Rights Act to the States. It was described as "[l]egislation to implement this aspect of the Fourteenth Amendment"[12] and as "fulfill[ing] the Congressional duty to enact the 'appropriate legislation' to insure that all citizens are treated equally."[13] So in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976). But in 1974 in contrast, Congress said nothing about the Fourteenth Amendment or equal protection and instead continued to base the extended ADEA on the Commerce Clause where it has rested from its inception.

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11. H.R. 93-913, Fair Labor Standards Amendment of 1974, 2 U.S. Code Cong. & Adm. News 2849 (93rd Cong., 2nd Sess. 1974).

12. H.R. 92-238, *Equal Employment Opportunity Act of 1972*, 2 U.S. Code Cong. & Adm. News at 2154 (92nd Cong., 2nd Sess. 1972).

13. S.R. 92-415 in *Legislative History of the Equal Employment Opportunity Act of 1972* at 420 (GPO 1972).

(b) *Definition of "employer"*: All that was done to the ADEA by the 1974 amendment was to expand the definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State," 29 U.S.C. § 630(b). The *Missouri* decision in 1973 should have been ample warning that this could not abrogate the Eleventh Amendment.

(c) *The enforcement provisions*: Congress did nothing to revise the enforcement provisions of the ADEA, thus repeating the identical mistake which it had committed in 1966 in attempting to extend the FLSA to State entities. The only revision instead came in providing in the enforcement section of the FLSA that an action to recover unpaid minimum wages or unpaid overtime compensation and liquidated damages "may be maintained against any employer (including a public agency)," 29 U.S.C. § 216(b). So when the petition argues today that "Section 216(b) evinces Congress' intent that employees be permitted to sue state employers in federal court,"[14] it is referring to the FLSA, not to the ADEA. The sole argument is that the insertion of the parenthetical phrase "including a public agency" in the FLSA (but not the ADEA) reflected Congress' unmistakable intent to abrogate Eleventh Amendment immunity for the ADEA.

***4. The Wyoming case in 1983*:**

In the era when Congress could abrogate the Eleventh Amendment through the Commerce Clause, the 1974 errors remained buried because "[t]he

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14. United States petition at 15.

extension of the ADEA to cover state and local governments . . . was a valid exercise of Congress' powers under the Commerce Clause." *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). With the Commerce Clause being all that was needed for abrogation in those days, the majority opinion declined to consider if the 1974 extension of ADEA coverage could be sustained as Fourteenth Amendment legislation.

But in a remarkable harbinger of *City of Boerne*, then 14 years in the future, the Chief Justice and Justices Powell, Rehnquist, and O'Connor spoke on the subject. Beginning with the fact that Congress relied on the Commerce Clause in enacting the ADEA in 1967 and in extending it to the States in 1974,[15] they concluded that

> [I]t cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court. 460 U.S. at 261 (dissenting opinion).

With the further position that "the Age Act can be sustained only if we assume . . . Congress can define

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15 . 460 U.S. at 251 said with reference to the Commerce Clause that:

> [I]t was upon this power that Congress expressly relied when it originally enacted the Age Act in 1967 . . . and when it extended its protections to state and local government employees, see HR 93-913, pp 1-2 (1974).

rights wholly independent of our case law,"[16] those views expressed in 1983 are accurately described as "a preview of the Court's opinion in *City of Boerne*." *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822, 828 (8th Cir. 1998).[17]

5. Seminole Tribe in 1996:

The Commerce Clause foundation for the extension of ADEA coverage to the States became extinct when *Seminole Tribe* came down in 1996. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Because "Federal jurisdiction over unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States,' "[18] the Court held that the case authorizing abrogation through the Commerce Clause[19] "was wrongly decided, and that it should be, and now is, overruled." The result is that only the Fourteenth Amendment "operated to alter the pre-existing balance between the state and federal power achieved by Article III and the Eleventh Amendment" and it alone can authorize abrogation. 517 U.S. at 65-66.

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16. 460 U.S. at 262.

17. Compare the District Court's comment in this case that

> *Wyoming*, however, presents one of those rare instances where a dissenting opinion provides the more useful statement of the law. 938 F. Supp. at 788, App. 67a.

18. 517 U.S. at 54.

19. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

That is the reason for today's revisionist arguments that: (a) the Court should say the Fair Labor Standards Amendment of 1974 was enacted pursuant to the Fourteenth Amendment; and (b) if that is an overreach, the Court should say that Congress "could have" used the Fourteenth Amendment.

B. The Court Need Not And Should Not Revisit The Abrogation Questions At This Time:

The abrogation questions — whether the 1974 amendment expressed an unmistakable intent to abrogate the Eleventh Amendment for the ADEA and whether it was enacted pursuant to the Commerce Clause or the Fourteenth Amendment — need not and should not be considered by the Court at this point in time for the following reasons:

1. They are immeasurably less important than the Boerne question:

Defective abrogation means only that employees may not sue their State employers based on Commerce Clause legislation in Federal Court because the Eleventh Amendment says they cannot do so. It does not limit "other methods of ensuring the States' compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14. Most notably, since the Eleventh Amendment is not applicable to the United States, the Federal Government can continue to sue State employers. Moreover, employees themselves can sue in State Court under the State laws proscribing age discrimination.[20]

20 . The majority of the States have such laws, including all the States in the Eleventh Circuit. Ala. Code Sections 25-1-20, *et seq*., Fla. Code Title XLIV Chapter 760 Sections 760.0, *et seq*., and Ga. Code Title 34 Chapter I Section 34-1-2.

The *Boerne* question, in contrast, has far-reaching dimensions. Even assuming *arguendo* the fictions that the 1974 amendment expressed an unmistakable intent to abrogate the Eleventh Amendment for the ADEA merely by inserting a parenthetical phrase in the FLSA, and further that it was with total silence based on the Fourteenth Amendment, the extension of coverage would remain a nullity if — as we say is the case — Congress exceeded the boundaries of equal protection jurisprudence as delineated by the Judicial branch.

There is accordingly no consideration impelling a revisit to the Eleventh Amendment following *Seminole Tribe* in 1996 and *Coeur d'Alene* in 1997.

2. The Legislative branch should be given the opportunity to repair the errors of 1974:

The abrogation questions indisputably arise because of the serial errors in the Fair Labor Standards Amendment of 1974. It rested the extension of ADEA coverage on the same Commerce Clause foundation which had been used in enacting the Act in 1967, even though the Fourteenth Amendment had been used in extending Title VII coverage only two years earlier in 1972. It attempted to expand coverage by adding States to the definition of "employer," although the *Missouri* decision just the year before held that could not be done. It was content to alter not a comma in the enforcement provisions of the ADEA, once again disregarding the teaching of *Missouri*.

The abrogation questions are thus attributable to the defects which the Legislative branch created in 1974. There is no sound reason for this Court to be

called upon to bring order out of this 1974 chaos. Just as the Court cannot permit Congress to declare the dimensions of the Constitution, an equal and reciprocal respect for the Legislative branch leads to the conclusion that Congress should be allowed the opportunity to correct the errors it committed in 1974.

The sensible solution for the abrogation questions would therefore be to give Congress the opportunity to enact an amendment extending ADEA coverage to the States accompanied by the requisite expression of unmistakable intent to abrogate and based on the Fourteenth Amendment. It would be easy enough for Congress to do so. It need do nothing more than track the recitals it used in enacting the Americans with Disabilities Act in 1990 in which it provided that "[a] State shall not be immune under the eleventh amendment," defined those with disabilities as "a discrete and insular minority," and said that it was relying on "the power to enforce the fourteenth amendment."[21]

With that done, the overriding *Boerne* question would remain, but this Court could then decide it without having to return once more to Eleventh Amendment analysis which has within the last Terms been the subject of both *Seminole Tribe* and *Coeur d'Alene*.

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21. 42 U.S.C. §§ 12101(a) and (b), § 12202. The point is not that such explicit declarations are necessarily essential but rather that Congress is well aware of the methods it must use to adhere to the limits of the Constitution as established by this Court.

III.

THIS IS NOT THE TIME OR THE CASE FOR REVISITING *BOERNE*

City of Boerne v. Flores, 521 U.S. 507 (1997) is an epochal chapter in the balance of power among the branches of the Federal Government. It tells us that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" and has no "power to decree the substance of the Fourteenth Amendment's restrictions on the States." As applied to the 1974 extension of coverage of the ADEA, the question brings to the forefront the position taken by four Justices in 1983 that "it cannot be said that in applying the Age Act to the states Congress has acted to enforce equal protection guarantees as they have been defined by this Court." *Wyoming*, 460 U.S. at 261.

But this is neither the case nor the time for resolution of that question for multiple reasons.

A. The Anomaly Of Taking Up A Question Which Is Not Among The Questions Presented By The Petitions:

While *Boerne* is related to the abrogation questions in the sense that abrogation requires a valid exercise of power, the dimensions of *Boerne* extend far beyond that point, as illustrated by the fact the case itself concerned no abrogation issue. So assuming the abrogation questions are cured by Congress, the extension of ADEA coverage to the States will in the final analysis turn on whether such legislation respects

or oversteps the boundaries of equal protection jurisprudence.

But this question is virtually invisible in the questions presented by the petitions. The Florida petition presents nothing but the single question whether the Eleventh Amendment bars an ADEA action in Federal Court. The United States presents the question only in terms of whether the Fair Labor Standards Amendment of 1974 was a valid exercise of the power of Congress, which is simply a by-product application of *Boerne*. Both petitions muddy the issue by saying the concurring Eleventh Circuit Judge "adopted the position that the ADEA failed the *Seminole Tribe* abrogation test"[22] because the concurring opinion essentially by-passed the abrogation questions and honed in on *City of Boerne* by concluding that "[t]he ADEA does not qualify under *Boerne*'s rule as a proper exercise of Congress's § 5 power." 139 F.3d at 1446, App. 43a.

It is obvious that the petitions have framed their questions presented in a manner designed to avoid or minimize Court consideration of that question. Perhaps they recognize that the question should be taken up in a case in which it is the only issue, unencumbered by any abrogation questions. More likely, they have a motive for attempting to focus the Court's attention on the abrogation questions because that is the principal division in the "Circuit split" on which they rely. The fact remains that it would most assuredly be anomalous to embark on resolution of the *Boerne* question when it has not been presented at all by one petition and is only indirectly presented by the other petition.

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22. Florida petition at 9, United States petition at 6.

B. The *Boerne* Question Came Into This Case At The Eleventh Hour:

With the Court's rules requiring the submission of the decisions of the courts below, it cannot be doubted that Supreme Court review is best conducted against the background of the rulings from both the District Court and the Court of Appeals on the issues. That could not be done here.

Boerne could not have been considered by the District Court since the ruling at that stage came in 1996 before *Boerne* in 1997. So also, since *Boerne* was decided after briefing in the Court of Appeals, it was not covered by any of the briefs, instead being brought to the Court of Appeals by FRAP 28(j) submissions.

It follows that the question of whether the Fair Labor Standards Amendment of 1974 was a case of Congress declaring equal protection rights without regard to equal protection jurisprudence should be considered by this Court in a case in which the issue has been fully developed in the courts below.

C. The Circuits Have As Yet Given Only Sparse Consideration To The *Boerne* Question As It Applies To The ADEA:

The petitions for obvious reasons sound the trumpets for the "Circuit split," but that is meaningless without pinpointing the fracture line. That line principally concerns the Eleventh Amendment

abrogation questions, not the *Boerne* question.[23] With *Boerne* being of recent vintage, the Circuits have as yet given only sparse consideration to the impact of it on the extension of the ADEA to the States in 1974.

***1. The cases which preceded Boerne*:**

Most of the cases featured by the petitions antedated *Boerne* and therefore could not have addressed the question. *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694 (1st Cir. 1983); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982); *Davidson v. Board of Governors of State Colleges and Universities*, 920 F.2d 441 (7th Cir. 1990); *Hurd v. Pittsburg State University*, 109 F.3d 1540 (10th Cir. 1997) (*Hurd II*), adhering to *Hurd I*, 29 F.3d 564 (10th Cir. 1994).[24] Contra, *Farkas v. New York State Department of Health*, 554 F. Supp. 24, 27 (E.D. N.Y. 1982), *aff'd*, 767 F.2d 907 (2nd Cir. 1985), *cert. denied*, 474 U.S. 1033 (1985) ("the ADEA was enacted pursuant to the Commerce Clause of the Constitution and not the fourteenth amendment.").[25]

23. The Florida respondents are thus correct in acknowledging a split with respect to the "Eleventh Amendment challenge to the Age Discrimination in Employment Act ('ADEA')," that being the abrogation questions.

24. *Hurd II* was on April 1, 1997 prior to *City of Boerne* on June 25, 1997.

25. While petitioners cite *Santiago v. New York Department of Correctional Services*, 945 F.2d 25 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) and *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3rd Cir. 1996) among the pre-*Boerne* cases, they are not on point.

***2. The cases since Boerne*:**

The handful of cases since *Boerne* are principally attributable to the Circuit precedent rule, with the courts adhering to their pre-*Boerne* decisions in the context of the abrogation issue. *Goshtasby v. University of Illinois*, 141 F.3d 761, 769-772 (7th Cir. 1998) adhered to Circuit precedent antedating *Boerne* and disagreed that *Boerne* called for a different view. *Debs v. Northeastern Illinois University*, 153 F.3d 390, 394 (7th Cir. 1998) likewise adhered to Circuit precedent without even mentioning *Boerne*. *Migneault v. Peck*, 158 F.3d 1131, 1136-1139 (10th Cir. 1998) similarly adhered to Circuit precedent, holding that "the *City of Boerne* decision does not alter our prior decision in *Hurd*. . . ."[26]

The courts which have not been drawn into the magnetic pull of the Circuit precedent rule have continued to focus primarily on the abrogation questions. *Scott v. University of Mississippi*, 148 F.3d 493, 501-503 (5th Cir. 1998) treated *Boerne* only as support for the conclusion that the 1974 amendment was enacted pursuant to the Fourteenth Amendment. *Coger v. Board of Regents of State of Tennessee*, 154 F.3d 296, 305-307 (6th Cir. 1998)[27] considered the

26. A Tenth Circuit law clerk was not attentive to his or her responsibility for accuracy of detail when the *Migneault* opinion was being written. It has the Court saying that "the ADEA limits its coverage to age discrimination for workers who are at least forty but less than seventy years old," 158 F.3d at 1139, but since the age 70 cap was removed in 1987, the coverage of the law is age 40 to death. 29 U.S.C. § 631(a).

27. A petition for certiorari has been filed in *Coger* (No. 98-821).

Boerne question but only following major attention to the abrogation questions.

3. No consideration at all to the Boerne question:

The petitions point to *Keeton v. University of Nevada System*, 150 F.3d 1055 (9th Cir. 1998) as being in the "Circuit split." The Ninth Circuit, however, considered the abrogation questions only, with no reference to *City of Boerne*.

4. The only cases giving detailed attention to the Boerne question:

The only detailed attention to the question of whether the 1974 Fair Labor Standards Amendment transgressed *Boerne* has consisted of: (a) the concurring Eleventh Circuit Judge in this case; and (b) the Eighth Circuit's holding in *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822, 828 (8th Cir. 1998) agreeing that the ADEA "exceeds Congress's § 5 powers as defined in *City of Boerne*, for the reasons set forth in Chief Justice Burger's dissenting opinion in *Wyoming*."

5. Summary:

With the Court's crushing caseload, it is eminently sensible that a Circuit division equates to Supreme Court review "only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone."[28]

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28. Justice Harlan as quoted in Stern, Grossman, and Shapiro, *Supreme Court Practice* (6th ed.) page 198.

The "Circuit split" here principally concerns the abrogation questions and thus is not "one that can be effectively resolved only by the prompt action of the Supreme Court alone." Instead, the Legislative branch which created those problems by the Fair Labor Standards Amendment of 1974 should be allowed the opportunity to repair them.

D. This Case Is Not An Appropriate Vehicle For The Resolution Of The Boerne Question:[29]

This is far from a run-of-the mill age case because it extends to the following:

1. Retaliation:

MacPherson and Narz rely heavily on claims of retaliation, starting with the allegation of the complaint that they have been denied committee assignments, sabbaticals, adjustments to salaries, and benefits "as a result of their filing internal grievances with Defendant, charges of discrimination with the EEOC, and a lawsuit against Defendant." But that would exceed equal protection jurisprudence. *Bernheim v. Litt*, 79 F.3d 318, 323 (2nd Cir. 1996) ("we know of no court that has recognized a claim under the equal protection clause for retaliation following complaints of racial discrimination."); *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997) ("A pure or generic retaliation claim, however, simply does not implicate the Equal Protection Clause.").

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29. Since this case was consolidated with the Florida cases only for oral argument in the Court of Appeals, the University of Montevallo's position throughout is limited to whether Supreme Court review of this case would or would not be in order.

2. Impact without intent:

They further place substantial reliance on the impact theory, alleging "that Defendant's practices with respect to these areas has had a disparate impact on older faculty members." Their reliance on that theory of liability is emphasized by their contention that in their first lawsuit, the Eleventh Circuit implicitly approved the application of the impact theory to age cases. *MacPherson v. University of Montevallo*, 922 F.2d at 770-773.

The Court is well aware that the impact theory imposes liability irrespective of there having been no intentional discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("neutral on their face, and even neutral in terms of intent"). That could not be authorized by equal protection jurisprudence which requires proof of intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 238-239 (1976) (considering differential impact and not discriminatory purpose "is not the constitutional rule.").

3. Summary:

This case is therefore not the vehicle for resolution of the *Boerne* question. First, no Circuit has as yet addressed the power of Congress to prohibit retaliation or to impose liability without intent in light of *Boerne*'s requirement that Congress's § 5 authority is to enforce equal protection jurisprudence, not to determine it. This Court would therefore be the first to consider the issues, having no backdrop of Circuit decisions on the subject. Second, it would require taking analysis a quantum step beyond the contours of legislating

against age discrimination on the authority of equal protection jurisprudence into the even further reaching questions of whether Congress could have imposed liability for retaliation and for effects irrespective of intent consistent with equal protection jurisprudence.

E. Concurrent Consideration Of The Impact Issue For Both The ADEA And Title VII:

The Florida petitioners argue that concurrent consideration with *Alden v. Maine* (No. 98-436) would throw "cross-lights,"[30] but *Alden* concerns the entirely dissimilar situation of a State Court applying State sovereign immunity to lawsuits based on Federal laws.

What would cast illuminating cross-lights would be concurrent consideration for both the ADEA and Title VII of whether Congress was authorized by equal protection jurisprudence to impose liability on the States for practices which are unlawful only because of their effect, there being no element of discriminatory intent. That is so because the identical problem of Congress imposing liability regardless of intent exists in Title VII as applied to the States. Although the extension of Title VII coverage in 1972 was based on the Fourteenth Amendment and is therefore sustained by that source, the Court has not had occasion to consider if the 1972 Congress was authorized by equal protection jurisprudence to subject the States to liability based on impact even though there is no trace of intentional discrimination. Imposing such liability on the States would therefore best be considered at the same time for Title VII and the ADEA. It would

30. Florida petition at 5.

hardly be consistent with economy of judicial resources to treat them at different times or in different Terms.

That is emphasized by the consideration that the Title VII plaintiffs' bar would recoil at the prospect of their much beloved impact theory of liability[31] being at the risk of disappearing from Title VII lawsuits against the States through a decision in an ADEA case. They would undoubtedly espouse the view that differences based on the immutable characteristics protected by Title VII are anchored in equal protection jurisprudence as contrasted with attaining ADEA status by reaching age 40, which merely "marks a stage that each of us will reach if we live out our normal span." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313-314 (1976).

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31. As reduced to the essentials in the phrase "disparate treatment, defendant wins; disparate impact, plaintiff wins."

CONCLUSION

Consistent with the compelling need for the Supreme Court to move on to new questions as distinguished from revisiting areas of the law which have been only recently considered, the University of Montevallo submits that certiorari should be denied.

Respectfully submitted,

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